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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/625,943	07/24/2003	Joseph V. Rustad	16010-07269	9924
758	7590	09/11/2007		
FENWICK & WEST LLP SILICON VALLEY CENTER 801 CALIFORNIA STREET MOUNTAIN VIEW, CA 94041			EXAMINER JEAN, FRANTZ B	
			ART UNIT 2154	PAPER NUMBER
			NOTIFICATION DATE 09/11/2007	DELIVERY MODE ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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## Office Action Summary

Application No.

10/625,943

Applicant(s)

RUSTAD ET AL.

Examiner

Frantz B. Jean

Art Unit

2154

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 19 June 2007.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-29 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1-29 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

This office action is in response to applicants' response filed on 06/19/07. Claims 1-29 are still pending in the application.

#### ***Response to Arguments***

Applicant's arguments with respect to claims 1-29 have been considered but are moot in view of the new ground(s) of rejection.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 2 and 19 recite the limitation "the remote network node". There is insufficient antecedent basis for this limitation in the claim.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein

were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-29 are rejected under 35 U.S.C. 103(a) as being obvious over Vanlint US patent Number 6,922,417 in view of Gibart et al. hereinafter Gibart US publication number 2004/0153534 A1.

The applied reference, Vanlint, has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(I)(1) and § 706.02(I)(2).

As per claim 1, Vanlint teaches a computer system for calculating latency of a network (see abstract), comprising: an active request generator that generates periodic request to a node on the network; an active request log that stores request timing information regarding the timing of the periodic requests generated by the active request generator; a response handler that receives responses from the node; a response log that stores response timing information regarding the timing of the responses received by the response handler; and a latency curve (graphical display output, element 70 fig 3) generator that calculates a latency curve based upon the request timing information and the response timing information (see fig 3, 7-10; col. 2 lines 44-67; col. 3 lines 15-31; col. 4 lines 26-35; col. 5 lines 37-41). However, Vanlint does not explicitly teaches a single active agent (node) configured to transmit requests and receive responses to the requests to generate a single trace file. Gibart is directed to measurements of network delays, which allows control of measurement of network delay from a single node (see paragraph 0013). It would have been obvious to one of ordinary skill in the art at the time of the invention to combine Gibart's measurement of network delay from a single node to Vanlint's system to track, detect and measure excessive delay across the network. One skill artisan at the time of the invention would be motivated to do so to minimize the burden on the network bandwidth when network delay changes at a low rate (see Gibart at par 0015).

As per claim 2, Vanlint teaches requests that are directed to an identified closed port at the node (see col. 3 lines 48-64; col. 10 lines 18-39).

As per claim 3, Vanlint teaches a request decay controller that regulates a wait period ... (see col. 2 lines 44-65).

As per claim 4, Vanlint teaches an active response filter that identifies responses ... (col. 2 lines 59-65, sniffer).

As per claim 5, Vanlint teaches a node data manager that identifies a plurality of nodes on the network ... (see fig 1-2; col 3 lines 15-31).

As per claim 6, Vanlint teaches an outgoing, incoming and a continuous latency calculator ... (see fig 3, and 7-10; col. 2 lines 15-24; col. 6 lines 10-22).

As per claims 7-8, Vanlint teaches self-queuing compensator that adjusts outgoing and incoming latency (see col. 4 lines 36-49).

As per claim 9, Vanlint implicitly teaches minimum latency calculator (see fig 7-10; col. 5 line 57 to col. 6 line 9).

As per claim 10, Vanlint teaches a computer system for calculating latency from transmit times of individuals packets of a network application comprising: an active latency detection module configured to calculate latency data based upon periodic requests to a network node that are denied by the network node; a packet capture module that receives application data packets from the network node related to the network application; a trace data storage module that stores network application and a latency trace generation module that calculates latency of the network application based upon the latency data calculated by the active latency detection module and the network application trace data information (see fig 3, 7-10; col. 2 lines 44-67; col. 3 lines 15-64; col. 4 lines 26-35; col. 5 lines 37-41). However, Vanlint does not expressly teach an

active latency detection module within a single node. Gibart is directed to measurements of network delays, which allows control of measurement of network delay from a single node (see paragraph 0013). It would have been obvious to one of ordinary skill in the art at the time of the invention to combine Gibart's measurement of network delay from a single node to Vanlint's system to track, detect and measure excessive delay across the network. One skill artisan at the time of the invention would be motivated to do so to minimize the burden on the network bandwidth when network delay changes at a low rate (see Gibart at par 0015).

As per claims 11-29, they contain the same limitations as discussed in claims 1-10 above. Therefore, they are rejected under the same rationale.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frantz B. Jean whose telephone number is 571-272-3937. The examiner can normally be reached on 8:30-6:00 M-f.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Nathan J. Flynn can be reached on 571-272-1915. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Frantz Jean



**FRANTZ B. JEAN**  
**PRIMARY EXAMINER**